

E-FILED on 11/13/06

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DAVID FLETCHER, *et al.*

Plaintiffs,

V.

TERRY SOLOMON, *et al.*

### Defendants.

No. C-06-05492 RMW

## ORDER GRANTING MOTION TO REMAND

**[Re Docket Nos. 14, 24, 31, 36, 37, 38]**

<sup>18</sup> Plaintiffs David Fletcher *et al* move to remand this action to the California Superior Court.

19 | For the reasons set forth below, the court grants the motion.

## I. BACKGROUND

Fletcher and several other individuals filed a complaint in the Santa Clara County Superior Court against Merrill Lynch Pierce Fenner & Smith Inc., Irene Ng, and thirteen other individuals and business entities. The complaint contains fifteen enumerated causes of action, entitled "Money Due on Default on Note," "Money Due on Dishonor of Check," "Intentional Misrepresentation," "Fraudulent Nondisclosure," "Negligent Misrepresentation," "Fraudulent Concealment," "Negligence," "Negligent Supervision," "Conversion based on Misrepresentation," "Conversion based on Agents [sic] Failure to Deposit Funds," "Accounting," "Unjust Enrichment based on Money Had and Received," "Federal Civil RICO Violations - 18 U.S.C. §§ 1962 and

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IAH**

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1 1964," "Civil Conspiracy - Common Law and 18 U.S.C. § 1962(d)," and "Declaratory Relief."  
2 Plaintiffs assert many of these causes of action, including the primary RICO cause of action,  
3 against all defendants other than Merrill Lynch. Plaintiffs assert the RICO conspiracy cause of  
4 action under 18 U.S.C. § 1962(d) against all defendants.

5 Plaintiffs have served only Merrill Lynch and Ng, and none of the other defendants have  
6 appeared in the action. Though plaintiffs filed returns of service for Merrill Lynch and Ng  
7 indicating that plaintiffs had served Merrill Lynch in June and Ng in July 2006, both defendants  
8 contested service. After some discussion, the parties agreed that Merrill Lynch and Ng would  
9 accept substituted service by mail under California Code of Civil Procedure § 415.30. Merrill  
10 Lynch and Ng signed and returned acknowledgments of such service on August 8 and 9, 2006,  
11 respectively.

12 On September 7, 2006, Ng and Merrill Lynch removed the action to this court, noting that  
13 federal-question jurisdiction existed over the RICO claims under 28 U.S.C. § 1331 and that  
14 supplemental jurisdiction existed over the other state-law claims under 28 U.S.C. § 1337. Seven  
15 days later, on September 14, 2006, plaintiffs moved for default against Merrill Lynch and Ng,  
16 claiming that the five days allotted to Merrill Lynch and Ng under Rule 81(c) for responding to the  
17 complaint ran on September 12, 2006.<sup>1</sup> On the afternoon of September 14, Merrill Lynch and Ng  
18 filed a motion to dismiss. The clerk properly declined the request for default the next day.  
19 Several hours later, plaintiffs filed both a motion to remand and a purported withdrawal of their  
20 now-denied motion for default.

21 Less than twenty-four hours before the hearing on plaintiffs' motion to remand, plaintiffs  
22 filed a notice that they were voluntarily dismissing without prejudice under Rule 41(a)(1) their  
23 two RICO claims (the only federal claims in the suit) and a handful of defendants.<sup>2</sup> Plaintiffs  
24 appear to meet the requirements of Rule 41(a)(1)—the defendants have not answered or moved for  
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26 <sup>1</sup> Plaintiffs, however, overlooked Rule 6(a), under which weekends are generally excluded from  
27 computation of periods of time of ten or fewer days.

28 <sup>2</sup> It has been represented to the court that plaintiffs dismissed all unserved defendants with  
citizenship diverse from that of the plaintiffs, though diversity of the parties was not discussed in the  
briefing on the motion to remand.

1 summary judgment, and the plaintiffs have not dismissed "an action based on or including" these  
 2 RICO or conspiracy claims before—so the dismissal without prejudice was effective upon filing.  
 3 At the hearing on the motion to remand, the plaintiffs offered to make the dismissal of their federal  
 4 claims with prejudice if the court would grant the motion. The court therefore orders that the  
 5 dismissal of plaintiffs' federal claims is with prejudice.

## 6 II. ANALYSIS

### 7 A. Remand

8 When the removability of an action is evident on the face of the complaint, the thirty-day  
 9 time limit for removal begins to run when the defendant is served with the complaint. *See Durham*  
 10 *v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). This "time limit is mandatory and  
 11 a timely objection to a late petition<sup>[3]</sup> will defeat removal," although "a party may waive the defect  
 12 or be estopped from objecting to the untimeliness by sitting on his rights." *Fristoe v. Reynolds*  
 13 *Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). The thirty-day limit for removal is a formality  
 14 that may be waived, rather than a jurisdictional barrier. *Id.*; *see also American Fire & Cas. Co. v.*  
 15 *Finn*, 341 U.S. 6, 17 (1951).

16 In *In re Moore*, the Supreme Court found a plaintiff had waived his right to move for  
 17 remand on the following facts:

18 After the removal the plaintiff, instead of challenging the jurisdiction of the United  
 19 States court by a motion to remand, filed an amended petition in that court, signed a  
 20 stipulation giving time to the defendant to answer, and then both parties entered into  
 21 successive stipulations for a continuance of the trial in that court. Thereby the  
 22 plaintiff consented to accept the jurisdiction of the United States court, and was  
 23 willing that his controversy with the defendant should be settled by a trial in that  
 24 court. The mere filing of an amended petition was an appeal to that court for a trial  
 25 upon the facts averred by him as they might be controverted by the defendant. And  
 26 this, as we have seen, was followed by repeated recognitions of the jurisdiction of  
 27 that court.

28 *In re Moore*, 209 U.S. 490, 496 (1908), abrogated in part on other grounds, *Ex Parte Harding*, 219  
 U.S. 363 (1911). The Central District of California has explained what generally constitutes the

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27 <sup>3</sup> In 1988, Congress changed the name of the document for removal from "petition of removal" to  
 28 "notice of removal." Judicial Improvements and Access to Justice Act, Pub. L. 100-702,  
 § 1016(b)(2)(A), 102 Stat 4642, 4669 (1988). The change in terminology is not relevant to the  
 motion under consideration.

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1 type of conduct which courts will construe as a waiver of a plaintiff's right to move for remand:

2 To constitute a waiver or consent to the federal court's assumption of jurisdiction  
 3 . . . there must be affirmative conduct or unequivocal assent of a sort which would  
 4 render it offensive to fundamental principles of fairness to remand, as where the  
 5 party seeking remand has been unsuccessful in litigation of a substantial issue, such  
 6 as the right to a jury trial or the right to take depositions or has filed an amended  
 7 complaint seeking further or different relief from the federal court.

8 *Transport Indem. Co. v. Financial Trust Co.*, 339 F. Supp. 405, 408 (C.D. Cal. 1972) (quoting  
 9 *Maybruck v. Haim*, 290 F. Supp. 721 (S.D.N.Y. 1968) (citations omitted)); see also *Fristoe*, 615  
 10 F.2d at 1212 (citing *Transport Indem.*).

11 The District of Oregon has twice ruled that a plaintiff who moves for default waives his  
 12 right to later move for remand. *Riggs v. Plaid Pantries, Inc.*, 233 F. Supp. 2d 1260, 1270-72 (D.  
 13 Or. 2001); *Giraudo v. Henkels & McCoy*, 1993 WL 302354, \*2-3 (D. Or. 1993). As that court  
 14 noted, "an order of default, whether substantive or not, carries great significance. For example,  
 15 once the default order is entered, the defaulted party can no longer contest liability." *Riggs*, 233 F.  
 16 Supp. 2d at 1272.

17 However, under 28 U.S.C. § 1367(c)(3), a district court has discretion "to decline to  
 18 exercise supplemental jurisdiction over" an action if it "has dismissed all claims over which it has  
 19 original jurisdiction." See also *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172-74  
 20 (1997); *O'Connor v. Nevada*, 27 F.3d 357, 362 (9th Cir. 1997). When considering whether to  
 21 remand a cause of action, a court must consider whether remand will promote "the values of  
 22 economy, convenience, fairness, and comity." *Executive Software N. Am., Inc. v. U.S. Dist. Ct. for*  
*Cent. Dist. of Cal.*, 24 F.3d 1545, 1553 (9th Cir. 1994).<sup>4</sup> In *Carnegie-Mellon University v. Cohill*,  
 23 the Court stated:

24 A district court can consider whether the plaintiff has engaged in any manipulative  
 25 tactics when it decides whether to remand a case. If the plaintiff has attempted to  
 26 manipulate the forum, the court should take this behavior into account in

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27 <sup>4</sup> With the enactment of 28 U.S.C. § 1367(c) in 1990, the statutory concept of supplemental  
 28 jurisdiction replaced the common-law doctrines of pendant and ancillary jurisdiction. *Executive  
 Software*, 24 F.3d at 1555-56. The changes wrought were relatively minor. *Id.* at 1556-57. Pre-  
 § 1367 caselaw still provides guidance for a court when deciding whether to exercise the discretion  
 given for the four categories of cases listed in § 1367(c), such as the "economy, convenience,  
 fairness, and comity" considerations of such cases as *Carnegie-Mellon University v. Cohill*, 484  
 U.S. 343 (1988), and *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). *Executive  
 Software*, 24 F.3d at 1557.

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1 determining whether the balance of factors to be considered under the pendent  
 2 jurisdiction doctrine support a remand in the case. The district courts thus can  
 3 guard against forum manipulation without a blanket rule that would prohibit the  
 4 remand of all cases involving pendent state-law claims.

5 484 U.S. 343, 357 (1988). Ordinarily, if all claims over which a district court has original  
 6 jurisdiction have been dismissed before trial in a removed action, the remaining state-law claims  
 7 should be remanded to state court. *See Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997)  
 8 (*en banc*); *see also id.* (O'Scannlain, J., dissenting).

9 Merrill Lynch quotes from *Albingia Versicherungs A.G. v. Schenker International*, 344 F.3d  
 10 931, 938 (2003), *modified*, 350 F.3d 916, for the proposition that the Ninth Circuit will not "let [a  
 11 plaintiff] take its chips off the table because it didn't like the dealer's hand."<sup>5</sup> In *Albingia*, the  
 12 district court made a summary judgment ruling that both disposed of the federal issues in the case  
 13 and decided the state-law issues unfavorably to the plaintiff. 344 F.3d at 934-35. The plaintiff did  
 14 not attempt to have the case remanded until after the district court had ruled on the state-law  
 15 issues. *Id.* at 936. This is different from the situation here, where the only unfavorable decision  
 16 the plaintiffs have received is a denial by the clerk of their procedurally-defective request for  
 17 default against Merrill Lynch and Ng.

18 Merrill Lynch and Ng vigorously argue that this court has discretion to continue exercising  
 19 supplemental jurisdiction over this action. Merrill Lynch and Ng are correct that plaintiffs' motion  
 20 for default was "affirmative conduct" invoking the power of the court which could justify denying  
 21 their motion to remand, particularly as plaintiffs were unsuccessful. *See Transport Indem.*, 339 F.  
 22 Supp. at 408. However, it is also clear that this court nevertheless has discretion to decline to  
 23 exercise supplemental jurisdiction over this action, and there is a strong preference for remand in  
 24 this situation. *See, e.g., Carnegie-Mellon*, 484 U.S. 349-50; *Acri*, 114 F.3d at 1001.

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25 <sup>5</sup> Under Civil L.R. 7-3(d), leave of court is required to file any motion papers after a reply has been  
 26 filed. On the afternoon after the hearing on the motion to remand, Merrill Lynch submitted a letter  
 27 addressing a district court's discretion to retain state-law claims after dismissal of all federal claims.  
 28 Plaintiffs object and ask that the court either not consider the letter or grant them leave to respond.  
 Though the plaintiffs have a valid objection, the court will consider the letter because of the timing  
 of plaintiffs' dismissal of their federal claims. As the court is granting the motion to remand, the  
 plaintiffs are not prejudiced by consideration of Merrill Lynch's letter.

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1       Here, plaintiffs clearly desire a state forum, as they could have filed this action as an  
2 original matter in federal court but chose not to do so. The plaintiffs are obviously more interested  
3 in their state claims than their federal claims, and the Ninth Circuit has found nothing wrong with  
4 plaintiffs promptly dropping federal claims and seeking to have a matter remanded. *Baddie v.*  
5 *Berkeley Farms*, 64 F.3d 487, 490-91 (9th Cir. 1995). Neither this court nor the Superior Court  
6 has put a substantial amount of work into this case. While it might be fair to not remand this  
7 action based on the plaintiffs' unsuccessful default request, the other concerns of economy,  
8 convenience, and comity would be served by returning to state court what is now at an early stage  
9 a purely state-law action. The motion for remand is therefore granted.

**10 B. Sanctions and Costs**

11       In their motion to remand, plaintiffs request attorneys' fees and costs pursuant to 28 U.S.C.  
12 § 1447(c). However, the plaintiffs are bound by the terms of their agreement regarding service on  
13 Merrill Lynch and Ng, so the removal was timely. That California Rule of Court 212(f) somehow  
14 constrains a defendant's ability to remove the case raises Supremacy Clause concerns. *See* U.S.  
15 Const. art. VI, cl. 2. Merrill Lynch and Ng's removal was therefore proper, and an award of fees or  
16 costs under § 1447(c) would not be "just" in this instance.

17       Merrill Lynch's oral request for sanctions under Rule 11 or the court's inherent powers is  
18 denied. *See* Fed.R.Civ.P. 11(c)(1)(A); Civil L.R. 7-8; *Baddie*, 64 F.3d at 491.

**19 III. ORDER**

20       For the foregoing reasons, the court

- 21           1.     denies all requests for fees, costs, or sanctions;
- 22           2.     orders that the voluntary dismissal of plaintiffs' federal claims is with  
23                          prejudice;
- 24           3.     grants the plaintiffs' motion to remand; and
- 25           4.     does not reach the merits of Merrill Lynch and Ng's motion to dismiss.

1 The clerk of this court shall, pursuant to 28 U.S.C. § 1447(c), mail a certified copy of this order to  
2 the clerk of the Santa Clara County Superior Court.

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DATED: 11/13/06

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*Ronald M Whyte*  
RONALD M. WHYTE  
United States District Judge

United States District Court

For the Northern District of California

1 | Notice of this document has been electronically sent to:

2 || Counsel for Plaintiff:

3 Andrew Vinson Stearns astearns@loboinc.com  
Robert M. Gagliasso  
4 Ignascio G. Camarena

## 5 || Counsel for Defendants:

6 Alexandra Wald  
Gloria Patricia Flores gfloresletelier@aol.com  
7 James M. Davis  
Lawrence T. Gresser  
8 Oliver Haker  
Blanca Fromm Young blanca.young@mto.com  
9 Marc T.G. Dworsky dworskymt@mto.com

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4 || Dated: 11/13/06

/s/ JH  
**Chambers of Judge Whyte**